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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB28

June 5, 2019

VIA EMAIL

Ms. Sarah Mueller
Delaware Public Media
Sarah.mueller@delawarepublic.org

RE: FOIA Petition Regarding the City of Wilmington

Dear Ms. Mueller:

We write in response to your correspondence alleging that the City of Wilmington ("City") violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA") in connection with your request for records. We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005 regarding whether a violation of FOIA has occurred or is about to occur. As discussed more fully herein, we determine that this Petition is moot, as the City has since provided you with a response to your FOIA request.

BACKGROUND

On December 7, 2018, you submitted a FOIA request to the City for four items: 1) "[a]ll communication from any member of the Wilmington police department regarding panhandling and geographical no contact orders from Jan. 1, 2016 to Dec. 6, 2018;" 2) "any lists or logs that track police requests of geographical no contact order requests for the same time frame;" 3) "all geographical no contact orders requested by police officers that ask for the downtown business district or the entire city to be off limits;" and 4) "all communication, including emails, that mentions the following people or is send [*sic*] to or from or is copied on police chief Robert Tracy, Mayor Mike Purzycki, and Rob Buccini from Jan. 1, 2016 to Dec. 6, 2018."¹

¹ Petition.

In its January 4, 2019 response, the City stated the first request was “vague and extremely broad.”² As the City employs approximately 300 uniformed officers and over 100 civilians and as the searches would likely exceed the \$1.00 expense authorized in your request, the City asked if you would like to narrow your request. In February, you indicated to the City that you wished to “drop” this first request.³ The City also denied the second and third requests because respectively, no such public record exists and the City did not possess these documents.

Regarding the fourth request, the City stated in its January response that the request was “vague, extremely broad, and likely voluminous” and as the searches likely exceed the \$1.00 authorized expense, again invited you to narrow your request.⁴ In February, you spoke with a member of the City Law Department about narrowing the search for the fourth item, who subsequently passed this item to Senior Assistant City Solicitor Marlaine White on February 20, 2019. On the following day, Ms. White contacted you and indicated that she needed to confirm the exact search parameters, as she had differing information about the scope of the search. After receiving an email from you questioning the lack of response, Ms. White reiterated her request to affirm the parameters of your search for the fourth item, which was done via a series of emails in April 2019.⁵ In that exchange, you confirmed that you wanted the City to conduct a “search of the Mayor’s emails from January 2017 (when Mayor Purzycki took office) to December 2018 under the search term ‘Buccini.’”⁶ The City provided estimated timeframes to produce the documents responsive to this narrowed search on May 1, 2019, May 10, 2019, and May 15, 2019. This Petition was filed on the same day you received the last update.

The Petition states that as of May 15, 2019, you had not received a single document in response to your FOIA request originally filed in December 2018. You allege that the City has “delayed and obfuscated for months in order to not produce anything in response to my request.”⁷

² *Id.*

³ Email from Sarah Mueller to Marlaine White dated February 22, 2019.

⁴ Petition.

⁵ Email from Sarah Mueller to Marlaine White dated April 9, 2019 at 5:21pm (“I had an understanding with Matthew Warren on what the search would be. Why is there a need to further narrow parameters? ‘When I discussed with Matt, he was of the impression that the narrowed request would be a search of the Mayor’s emails from January 2017 to (when Mayor Purzycki took office) to December 2018 under the search term “Buccini.” . . .”); email from Marlaine White to Sarah Mueller dated April 9, 2019 at 5:24pm (“Is the search quoted below the parameter you wish to submit?”); email from Sarah Mueller to Marlaine White dated April 9, 2019 at 5:38pm (“I believe it was the agreement Matthew said he would do back in January or February and that it would be free.”); email from Marlaine White to Sarah Mueller dated April 10, 2019 (“I will contact the IT Director today and be back in touch with you as soon as I receive his response.”).

⁶ *Id.*

⁷ Petition.

After initially stating the records would be produced “after a very long wait” on May 10, 2019, the City then stated “[i]t was by today... [and] [n]ow it is by May 22nd.”⁸ For these reasons, you allege the City violated FOIA.

The City submitted its Response through counsel on May 22, 2019, stating that the City’s final response and produced records were attached.⁹ The City asks this Office to find that the Petition is now moot, as the requested documents have now been provided or alternatively, that the City did not violate FOIA. As evidence, the City cites to the numerous emails the parties exchanged reflecting the City’s efforts to assist you in narrowing the request in response to your request to create a search with no cost after the City denied your request for a fee waiver. The City states that the protracted process results from “the Petitioner’s own, self-imposed financial limitation and her failure to provide clear, targeted requests for public records in light of that limitation.”¹⁰

You submitted a responsive email later the same day (“Reply”). You point out that the request was made in December, and a response was not received until now. Additionally, you allege that you did not intend to request emails from the Mayor, as you had initially submitted the request to the Wilmington Police Department. Instead, you thought you had “agreed to a one-hour search of the police chief’s emails,” and you “didn’t realize until May 1st that it was of the mayor’s emails.”¹¹ However, after “pushing for movement on [your] FOIA request around Feb. 18th and April 9th, [you were] ready to see the production of whatever the city had finally done,” but you noted that “then the date slipped from May 10th to May 15th to May 21st.”¹²

DISCUSSION

FOIA requires a public body to respond to a records request as soon as possible but no later than fifteen business days by denying or granting access to the records, or if more time is needed, to provide a statutorily-acceptable reason for the delay and a good faith estimate of the amount of time needed to respond.¹³ You sent a four-part FOIA request to the City on December 7, 2018. The record reflects that after the City provided an initial response, the parties agreed to a narrowed search for one item. The City states that it ordered an electronic search of its emails using the

⁸ *Id.*

⁹ Response.

¹⁰ *Id.*

¹¹ Reply.

¹² *Id.*

¹³ 29 Del. C. § 10003(h).

agreed-upon parameters for the narrowed search, performed a legal review of the resulting records, and provided a final response to your remaining FOIA request, attaching the records production. Although your Reply indicates your intention to submit a different request to search the City Police Chief's emails, the City affirms it has provided its final response to your narrowed request.¹⁴

Based on this record,¹⁵ we find that your Petition regarding the timeliness of the response is now moot, as the City has completed its response to the FOIA request.¹⁶ To the extent that you wish to seek records outside of the agreed search parameters as you indicate in your Reply, you may wish to file that specific records request with the City of Wilmington.

¹⁴ Our consideration is limited to the claims raised in the Petition. *See, e.g., Del. Op. Att'y Gen.* 18-IB51, 2018 WL 6591816, at *FN 4 (Nov. 20, 2018); *Del. Op. Att'y Gen.* 12-IIB11, 2012 WL 5894039, *4 (Nov. 7, 2012).

¹⁵ We note that the record does not reflect that the City acted in bad faith or engaged in a pattern of noncompliance. To the contrary, the correspondence shows the City's cooperative efforts to create a narrowed search resulting in no cost charged to you, as requested.

¹⁶ *See, e.g., Flowers v. Office of the Governor*, 167 A.3d 530, 546 (Del. Super. 2017) (“[T]he Court finds that any claimed violation regarding the Sample E-mails is moot because Appellants already possess them.”); *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *13 (Del. Ch. May 19, 1994) (in response to plaintiff's request for a declaration that its access to records was untimely, stating “[b]ecause the documents that are the subject of [plaintiffs'] FOIA requests were turned over to the plaintiffs on August 13, 1993, that claim is moot.”); *Del. Op. Att'y Gen.* 18-IB30, 2018 WL 3118433, *2 (June 7, 2018) (“Based upon the record, it is my determination that your Petition is now moot, as OGov has completed its response to your FOIA request.”); *Del. Op. Att'y Gen.* 18-IB25, 2018 WL 2994703, *1 (May 15, 2018) (“Based on the facts as presented to this Office, it is our determination that your petition is moot, as the City has provided a response to your April 11 FOIA Request.”); *Del. Op. Att'y Gen.* 17-IB35, 2017 WL 3426275, *FN 3 (July 31, 2017) (citing *Library, Inc. v. AFG Enterprises, Inc.*, 1998 WL 474159, at *2 (Del. Ch. July 27, 1998) (citation omitted)) (finding a challenge to the wholesale denial of a request is moot and noting that a matter “is moot when there may have been a justiciable controversy at the time a matter was commenced, but that controversy ceases to exist prior to the arbiter's determination.”).

CONCLUSION

For the reasons set forth above, we determine that the Petition is moot.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:



Aaron R. Goldstein
State Solicitor

cc: Marlane White, Senior Assistant City Solicitor, City of Wilmington (via email)